1. There Is No Basis In Policy Or Law For The Rule Of "Presumptive Availability" Proposed By Some Of The State Commissions And Incumbent LECs.

That is patently the case with the proposal that has been advanced by some other state utility commissions and several incumbent LECs. Under it, the Commission should only adopt a list of elements that is "presumptively available."[127] Such a "rule" would eliminate all the benefits of a national set of requirements, and should not be adopted under any circumstance. A list that can be diminished by the states would be the equivalent of a set of non-binding guidelines. It would lead to all the litigation, uncertainty, delay, and state-by-state philosophical variation that would occur if there were no national list at all. As CompTel explains, "[e]ven before any state actually removed a UNE from the list, the mere possibility that UNEs could be removed on a state-by-state basis would eliminate the certainty and efficiency of nationwide rules."[128]

The point can be graphically made very easily. When the Commission adopts binding national rules, the minimum set of elements are determined through one agency proceeding (before the Commission) and at most, a single appellate review proceeding in which the

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(. . . continued)
binding national list of the original seven network elements because "(1) certain UNEs are crucial to the provision of nondiscriminatory service regardless of jurisdiction, (2) national guidelines will provide a certain amount of stability to the law and will therefore expedite local exchange competition across the nation, and (3) national guidelines will ease CLEC entry in multiple markets through common service offerings"); Washington UTC at 5 (Section 251(d)(2) "by its plain terms, assigns to the Commission the role of "determining" the UNEs that must be made available").

[127] *See, e.g.*, Florida PSC at 5-8; Oregon PUC at 1; Ohio PUC at 4; New York DPS at 3; Texas PUC at 2-3; Iowa Utils. Bd. at 2; BellSouth at 29-31; U S WEST at 30.

[128] *See* CompTel at 53.

Commission's determinations will be upheld unless they are arbitrary, capricious, or contrary to law. Once the minimum list is thus established, all CLECs have an unconditional right to obtain the elements throughout the nation and can develop national, regional, state-wide, or community entry plans with certainty. They will know that particular elements with particular interfaces and other characteristics are available to them everywhere and that their right to these elements cannot be opposed in good faith by any incumbent LEC or state commission (regardless of its own policy preferences).

By contrast, if the Commission adopts a list of elements that is "presumptively available" or any other such non-binding guidelines, the Commission proceedings and appellate court review of them are just a first modest stop in a costly, burdensome, and time-consuming process. When a request for an element is made, the incumbent LEC will have the ability and incentive to oppose it in negotiations and in subsequent arbitrations – as the *First Report and Order* found and intervening events have confirmed.[129] In particular, each incumbent LEC can make claims that the Commission's presumption should be deemed rebutted and litigate whether the element should be made available to the particular CLECs who have requested it to provide all or some services. These state-be-state proceedings will address the need for elements on a market-by-market, element-by-element basis and will occur not only before 50 different state commissions, but also before at least 50 different federal district judges, and all 12 of the nation's federal courts of appeals. In addition to raising the same claims against the widespread availability of network elements that are raised here, the incumbent LECs can also argue that the CLEC and the

[129] *See First Report and Order* ¶ 241.

customers or markets they wish to serve have unique characteristics that should preclude granting access to incumbent LEC elements in that circumstance.

Indeed, no commenter even attempts to dispute that state-by-state or market-by-market determination of the available network elements will enormously increase the time it will take to establish those lists. Particularly in light of what Covad aptly describes as "the *Bleak House* style of litigation in which the ILECs revel,"[130] it is a certainty that state-by-state evaluation and application of impairment would turn into "a war of attrition in which consumers are destined to lose."[131]

Further, the reality is that the principal differences in the outcomes that will emerge from such a process will reflect not market variations but philosophical ones. The states' commitments to local competition and their perceptions of how it can best be achieved vary widely. Illinois and Ohio, for example, both contain a mix of urban and rural communities, and both regulate the same BOC. But their filings here could not be more different. Illinois has been a leader among states seeking to promote competition, and its comments recommend that the Commission reinstate the original list of seven network elements and add to it subloop unbundling and dark fiber.[132] Ohio, by contrast, opposes the unbundling of switching, transport, and OS/DA.[133] Any process that involves individualized decisions by state commissions would inevitably give free play to such

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[130] *See* Covad at iii.

[131] *See* CompTel at 23.

[132] *See* Illinois CC at 1-15.

[133] *See* Ohio PUC at 5-13.

differences, and would create a patchwork of decisions on the availability of network elements that would reflect not the application of the congressional standards to different sets of facts, but the application of radically different standards that would subvert the national policy established by Congress.

Moreover, national rules are needed to promote national entry by CLECs. That is particularly critical because AT&T and many other CLECs are seeking to provide competing exchange and exchange access competitively throughout the nation, and these efforts will patently advance the Act's objective of "competition by multiple providers" of local services.[134] Yet these objectives cannot be protected by decisions of individual state commissions. Even if state determinations were made quickly and with finality (as they could not be), and even if all states applied precisely the same standards in the same ways (as they would not), individual states could not and would not consider the impact of their decisions on the ability of CLECs to introduce and provide service on a national or regional basis. To the contrary, individual states can only determine whether and to what extent CLECs could serve areas within their borders through alternatives to the incumbent LECs' network elements. While there is no state in which that finding could be made today, it is possible that there could be a number of states that could make this finding in the future when they consider their communities in isolation from the rest of the nation, and each such state could then deny CLECs access to elements of the incumbent's network.

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[134] *See Iowa Utils. Bd.*, 119 S. Ct. at 726.

But the effect of these state orders would be to delay or altogether preclude the national and regional entry that fosters the Act's objectives. In particular, if and when it becomes feasible to establish alternate networks in a variety of locales, the economic reality would be that neither AT&T nor any other CLEC would have the capital and other resources required to do so simultaneously in each of the states where it is possible. To the contrary, the only way a national entry strategy could then be implemented would be by establishing alternative facilities in some areas and relying on leased network elements in others. But because no state would be in a position to consider the nationwide effects of its order, it would defeat the objective of nationwide and regional entry if authority over the availability of core network elements were delegated to individual states through the Commission's adoption of this or any other such proposal.

In short, a rule establishing only the "presumptive availability" of network elements would impose immense costs on CLECs that would impair and often preclude any competition through network elements both in individual states and in regional or national markets. Indeed, these facts are not disputed by any opponent of national rules. Nor do the opponents advance any valid policy ground for adopting rules of presumptive availability or other nonbinding guidelines.

Instead, these states and incumbent LECs argue that their proposal is nevertheless somehow required by the terms of the Act and the Supreme Court's decision in *AT&T* v. *Iowa Utilities Board.* But there is no basis for this claim. As numerous commenters point out, Section 251(d)(2) is "unambiguous" in requiring that the Commission – and not the states – make the determinations whether the standards of "impairment" or "necessity" have been satisfied for

individual proposed elements.[135] Further, the Act expressly provides that the Commission is required to make these determinations in nationwide rulemaking proceedings (§ 251(d)(1)) and that the Commission's rules bind the states in arbitrations (§ 252(c)).[136]

Those states who oppose national rules nonetheless contend that the Supreme Court impliedly held that the actual decisions of whether and when elements would be made available be made on a state-by-state basis by 50 different state commission proceedings. This claim is ironic in the extreme. The Supreme Court explicitly upheld the Commission's jurisdiction to adopt minimum national rules to implement each subsection of the 1996 Act. And the Court stated that it would be "surpassing strange" for a federal program instead to be "administered by 50 independent state agencies" and that there was a "presumption" against any such scheme.[137] As noted, there is nothing in the Act's terms or purposes that could even begin to rebut this presumption.

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[135] *See, e.g.*, Covad at 6; Illinois CC at 2; Washington UTC at 5; MediaOne at 5; Prism at 4.

[136] In addition, there is a third and independent reason why states cannot be allowed to make their own determinations of whether the impairment standard is met and to excuse an incumbent LEC from providing access to an individual element on that basis. Under the plain terms of the Act, whether a CLEC would be impaired if access were denied is merely one factor that the Commission must "consider" in making its determination of the elements that should be made available, and as the incumbent LECs told the Supreme Court, this factor is not "dispositive" of whether access to an element is required. *See supra* p. 50 n. 119; *see also Iowa Utils. Bd.*, 119 S. Ct. at 736 (there is a "rational basis" for requiring access to an element if that advances "the objectives of the 1996 Act"). Thus, under the proposal of some of the state commenters, they would be unlawfully nullifying a federal rule by attempting to relitigate a factual issue that is not even an essential underpinning of the rule.

[137] *See Iowa Utils. Bd.*, 119 S. Ct. at 730 n. 6.

It is also irrelevant that the Supreme Court held that the Commission is required to consider the availability of substitutes outside the incumbent LECs' networks when it makes impairment determinations. That holding does not permit, much less require, a rule in which the determinations of which elements are to be made available requires localized state-by-state, market-by-market and element-by-element determinations – much less that these determinations be delegated to state commissions. To the contrary, determinations in federal rulemaking proceedings are made generically by addressing conditions in the nation as a whole, and it is never the case that locality-by-locality determinations of facts is required before a national rule can be adopted or applied to a particular set of facts.

Indeed, the Supreme Court authorized the Commission to make the impairment determinations on a nationwide basis. The *First Report and Order* had determined a minimum set of elements by examining conditions in the nation as a whole and asking whether nationwide denials of access would impair any CLECs, and the Supreme Court did not hold that this was improper. It held only that the *First Report and Order* had applied too narrow a definition of impairment to the generic conditions in the nation.[138] The Court thus remanded Rule 51.319 to the Commission, so that it could now apply a broader definition of impair to the same conditions in the nation as a whole and to adopt another minimum list of elements that must be available

[138] In particular, it held only that the Commission should have considered whether there were available alternatives outside the incumbent LECs' network that were sufficient to allow CLECs to enter just as quickly, broadly, or effectively if access to elements were denied, and that the Commission should not have equated impairment of CLECs' ability to earn supracompetitive profits with impairment of their ability to compete.

nationally. The Commission is only to consider, based on conditions in the nation as a whole, whether any CLECs would be "impaired" in their ability to provide service to some classes of customers if they had to obtain an element from a source other than the incumbent LEC.

2. There Is No Basis For The Proposal Of Some Incumbent LECs That This Commission Make Market-By-Market And Element-By-Element Determinations And Require Further State Commission Determinations Before Any Request For Elements Must Be Granted.

In contrast to those state commenters who advocate non-binding guidelines, several of the incumbent LECs acknowledge that the Act's terms and the Supreme Court's decision require that determinations of impairment be made by the Commission (and not the states) and that the Commission adopt binding national rules.[139] However, these incumbent LECs offer a different "procedural" proposal that would have the same or an even greater crippling effect on exchange and exchange access competition.

Like those state commentors who oppose national rules, these incumbent LECs assert (erroneously) that the terms of the Act and the Supreme Court's decision require market-by-market and element-by-element determinations of whether there are CLECs whose ability to provide service would be impaired if access to the elements were denied. But the incumbent LECs' proposal differs in two significant ways from the proposals of these states. First, the incumbent LECs would have the Commission make these market-by-market and element-by-element comparisons (by conclusively presuming that all CLECs may use the same alternatives at the same costs to serve all customers who superficially appear to be similar) and to adopt national

[139] *See* GTE at 20-22; SBC at 15-18; Ameritech at 66-69.

rules that direct that identified elements be made available in specified "markets" but not in others. Second, under the incumbent LECs' proposal, whenever a CLEC requested an individual element, the incumbent LEC could reject it, and the parties would then litigate (in 50 different state commission proceedings and ensuing appeals) whether the element would in fact be used to provide service in the "market" in which it was authorized.

Adoption of this proposal would defeat the objectives of the Act in precisely the same ways as would the adoption of non-binding guidelines. This incumbent LECs' proposal would give them the same ability and incentive to frustrate and preclude competition by creating uncertainty, costs, protracted litigation, and substantial delays before network elements could be offered. The incumbent LEC proposal is even more insidious because it would assure that the Commission itself would declare incumbent LEC network elements to be unavailable in conditions in which the ability of CLECs to provide service would assuredly be severely impaired or eliminated altogether and in which no statutory objective would be served.

The short and complete answer to the incumbent LEC proposal is that it, too, rests on the erroneous premise that the Act and the Supreme Court's decision either require or permit determinations of impairment to be made on a market-by-market and element-by-element basis. For the reasons stated in Part III.A.1, that is simply wrong. The Commission is to continue to make findings of impairment based on conditions in the nation as a whole and may order the

availability of individual elements even if it finds no impairment will result from a denial of access but identifies other objectives of the Act that will be advanced.[140]

Nothing more need be said to refute the incumbent LECs' claims. But it is nonetheless noteworthy that the "market-by-market" determinations that the incumbent LECs propose have no foundation in economics, law, or policy, and would assure that network elements are unavailable in a vast array of conditions in which they are necessary for any form of exchange and exchange access competition to develop for an array of individual customers.

In particular, the proposals of these incumbent LECs rest on three premises that are each unsustainable as a matter of law, fact, economics, and logic: First, the incumbent LECs deem all customers who have similar volumes and needs are deemed to represent a single product and geographic market, *irrespective* of whether they are or could readily be offered service by the

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[140] Incumbent LECs also seek to justify their proposals by relying on the Commission's requirement of three density zones for network element prices. *See, e.g.*, Kahn Aff. at ¶ 17. But the fact that scale economies produces different costs for incumbent LECs in urban, suburban, and rural areas has nothing to do with whether there should be case-by-case litigation under the different provisions of § 252(d)(2) before any CLEC obtains access to a network element. To the contrary, the adoption of a binding national list of elements and the requirement of different density pricing zones are each essential to advancing the Act's objective of allowing network elements to be obtained at their cost and used to compete with incumbent LEC services at the earliest possible time. The use of different density zones for network element prices assures that CLECs pay the cost-based rates required by § 252(d) and do not incur artificially inflated costs that subject them to incumbent LEC price squeezes in certain higher density areas. Similarly, the adoption of a binding nationwide list of elements – without market by market litigation – is not only authorized by § 251(d)(2), but also is necessary to prevent incumbent LECs from acting on their incentives to impose costs and delays on CLECs that serve no statutory purpose. Finally, the incumbent LECs' cost advantages over users of non-incumbent LEC facilities reflect the economies of scale and scope that incumbent LECs enjoy in using their network elements because they have monopolies. To the extent these advantages exist in serving particular customers, they are present in all the different density zones.

same sets of suppliers at the same or similar costs or prices. Second, because these customers are all deemed to be part of a single market, the incumbent LECs would conclusively presume that the fact that one customer in the "market" is being served by a CLEC who uses alternatives to incumbent LEC facilities means that all customers in this "market" could obtain service using the alternatives at the same cost and price. Third, it follows in the view of these incumbent LECs that the fact that some large business or other customers exist who are served over alternative facilities conclusively establishes that denial of access to incumbent LEC elements could not impair any CLEC's ability to serve other customers in the "market."

The fallacy of this approach is demonstrated by the results it would reach. Even under the incumbent LECs' view of the facts, alternate facilities have been extended to only 15% of certain of the nation's office buildings in the three years since the 1996 Act was passed.[141] This represents a penetration rate of no more than 5% a year for those buildings that are most attractive and easiest to serve. The low rate of penetration reflects the reality that there are formidable economic and technical barriers that must be crossed on a building-by-building basis before a CLEC can use alternatives to incumbent LEC network elements to serve even the largest customers: *e.g.*, obtaining rights of way, a physical presence in the building, and sufficient traffic volumes to make the investment economic, as well as actually establishing fiber loops and other facilities. Yet under these incumbent LECs' proposal, the Commission would be required to conclude that the unavailability of the necessary network elements could not impair any CLECs in

[141] *See Huber Submission* at II-6, III-3.

the provision of service to any large business customers. That would be so even though there are very few buildings that are today reached by more than two sets of wire and that it will take years or longer to establish even one set of alternate facilities to the vast bulk of the nation's office buildings. Further, if this proposed rule were adopted, incumbent LECs could delay and profoundly burden the ability of CLECs to obtain network elements to serve other customers as well, for incumbent LECs could contend that these other customers are in fact in the same "market" as the large business customers and refuse to provide the necessary elements until state by state proceedings have been concluded.

The incumbent LEC approach is impermissible for two related reasons. First, it does not directly apply the criteria of § 251(d)(2). This section requires a determination whether there are CLECs whose ability to provide service would be impaired somewhere in the nation if incumbent LEC elements were unavailable and allows the Commission to order access to incumbent LEC elements even if impairment is not found. The statute does not authorize the Commission to ask only whether there is already a CLEC serving some segment of some broad "geographic or product" market that can be advocated. Nor does it allow the Commission to make impairment determinations on a market by market basis. As explained above, that would lead to the state-by-state, market-by-market, and element-by-element litigation that would impair and often preclude altogether the competition that the 1996 Act sought to foster. Thus, the Commission can and should reject the claims that it must determine whether and to what event there are discrete markets and submarkets for local telephone facilities and services.

Second, even if it were permissible to define product and geographic markets, the proposal of these incumbent LECs violates the most elementary principles of market definition. In particular, it is elementary that customers located in different areas of even the same community cannot be found to comprise a single geographic and product market unless each is currently served or could readily be served by the same suppliers who would charge all the customers the same prices (or prices that reflect only the difference in the cost characteristics of serving different customers). Here, by contrast, the incumbent LECs merely assume that all customers whose needs appear similar are in the same market, and then conclusively presume – contrary to fact – that all suppliers now serve or can readily now serve all customers in the market.

In short, the proposal advanced by GTE and other incumbent LECs suffers from the same, or even greater, deficiencies as does the proposal that the Commission merely adopt a list of elements that is to be presumed to be available.

B. The Incumbent LECs' Claims That States Are Prohibited From Adding To The National List Under State Law Are Meritless.

Although for the foregoing reasons state commissions should not be delegated any right to remove network elements from a nationally binding list, they have independent authority to impose additional obligations upon incumbent LECs under state law and may therefore add elements to a national list pursuant to that authority. As the Vermont Public Services Board correctly explains, the Act "establish[es] a *floor* beneath which State regulatory bodies may not

go, but not a *ceiling* on State efforts to encourage competition."[142] Thus, while "the framework devised by Congress prohibits states from restricting the set of unbundled elements required by the Act or by Commission rule," states may still adopt state-law "unbundling requirements . . . above the [federal] floor."[143]

That is the scheme established by the 1996 Act. However, several of the incumbent LECs, who previously posed as the champions of states' rights before the Eighth Circuit, have now thrown federalism overboard. Specifically, GTE, SBC, U S WEST, and Ameritech now contend that it would violate the Act for any state to adopt any unbundling requirements that are greater than those promulgated by the Commission.[144]

This claim is as much a misstatement of the law as their previous jurisdictional claims. To begin with, as the incumbent LECs explain it, their preemption claim appears to rest on their mistaken view that the Section 251(d)(2) standards are dispositive of what must be unbundled, rather than merely factors that the Commission must "consider, at a minimum."[145] Because they

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[142] *See* Vermont PSB at 4-5 (emphasis in original).

[143] *See id.* at 5; MGC at 7; Qwest at 42-43; C&W at 45-46; NEXTLINK at 6-7; MediaOne at 6; e.spire at 7; Net2000 at 6-7; Sprint at 8; CoreComm at 10-12; Joint Consumer Advocates at 5-6; Level 3 at 3; Prism at 10; Choice One at 3.

[144] *See* GTE at 28-29; SBC at 18-19; U S WEST at 31; Ameritech at 49.

[145] *See, e.g.,* GTE at 28-29 ("Both the Act's plain terms and the Court's decision in *Iowa Utilities Board* therefore compel the conclusion that the Commission must, 'at a minimum,' always find that the 'necessary' and 'impair' standards are satisfied before requiring an element's unbundling. This analysis also demonstrates . . . that the States are barred from imposing unbundling obligations pursuant to state law").

have completely misconstrued the "consider, at a minimum" language, their preemption argument fails even on its own terms. *See supra* pp. 47-50.

In all events, even if the Section 251(d)(2) factors were dispositive, state law would not be preempted. No provision of the Act expressly pre-empts state law unbundling requirements. And in the absence of an express statement that state law is pre-empted, Congress may be held to have pre-empted state law in only two other ways.

First, "state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."[146] "Alternatively, federal law may be in 'irreconcilable conflict' with state law."[147] In either case, any preemption analysis begins with a "presumption against the pre-emption of state police power regulations,"[148] and that presumption may not be overcome, and pre-emption found, "absen[t] an unambiguous congressional mandate to that effect."[149] Here, neither field preemption nor conflict preemption is present.

To begin with, there is plainly no field preemption. A federal statute will be held "to pre-empt all state law in a particular area . . . where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary

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[146] *See English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990).

[147] *See Barnett Bank* v. *Nelson*, 517 U.S. 25, 31 (1996) (quoting *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982)).

[148] *See Cipollone* v. *Liggett Group*, 505 U.S. 504, 518 (1992).

[149] *See Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 146-147 (1963).

state regulation."[150] In this instance, any claim of field pre-emption is foreclosed by the plain terms of the Act, for Congress "explicitly disclaimed any intent categorically to pre-empt state law."[151]

Specifically, Congress adopted four separate *anti*-preemption provisions. Section 261(c) expressly permits States to adopt "Additional State Requirements" that are "necessary to further competition";[152] Section 251(d)(3) "Preserv[es] . . . State access regulations";[153] Section

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[150] *See Hillsborough County* v. *Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

[151] *See California Fed. Sav. and Loan Ass'n* v. *Guerra*, 479 U.S. 272, 281 (1987).

[152] Section 261(c) provides:

> Additional State Requirements – Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

47 U.S.C. § 261(c).

[153] Section 251(d)(3) provides:

> In prescribing and enforcing regulations to implement the requirements of this section, the [Federal Communications] Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that
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> > (A) establishes access and interconnection obligations of local exchange carriers;
> >
> > (B) is consistent with the requirements of this section; and
> >
> > (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3).

252(e)(3) authorizes States to enforce State law in the course of reviewing interconnection agreements;[154] and Section 601(c)(1) of the 1996 Act is an express "savings clause" for State law.[155]

These provisions demonstrate not only that Congress did not "occupy the field," but that it specifically and expressly preserved State authority to adopt additional pro-competitive requirements.

That same congressional intent establishes that any claim of conflict preemption also must fail. As the Supreme Court has explained, "[t]he principle is thoroughly established" that the State's power "is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"[156] Here, no conflict of any sort exists. If the Commission requires incumbent LECs to make available seven unbundled

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[154]Section 252(e)(3) provides:

> subject to Section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

47 U.S.C. § 252(e)(3).

[155] Section 601(c)(1) provides:

> [t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

1996 Act, Section 601(c)(1), 110 Stat. 56, 143 (1996).

[156] *See Kelly* v. *Washington*, 302 U.S. 1, 10 (1937) (quoting *Sinnot* v. *Davenport*, 22 How. 227, 243 (1859)).

network elements, there is no conflict with a State rule that incumbent LECs must also make available an eighth network element as well. Nothing in such a state rule would forbid an incumbent LEC from doing anything the Commission has required, or require it to do anything the Commission has forbidden.[157]

The incumbent LECs nonetheless claim that any additional state obligations would conflict with the Act because such obligations would "frustrate[]" the "balance struck by Congress" in Section 251(d)(2).[158] The incumbent LECs appear to contend that Congress in the Act determined the precise and entire division of rights and obligations between incumbent LECs and CLECs, and that any State that imposes additional obligations on incumbent LECs alters that "balance" and creates a "conflict." But that premise is equivalent to a finding of field preemption, because the imposition of *any* additional state requirement would alter the precise "balance" struck by the Act in some way. If such state laws were deemed preempted, then the Act would leave no room for additional state obligations at all. But that position cannot be correct, for it "would render Congress' specific grant[s] of power to the States . . . meaningless."[159] Accordingly, the incumbent LECs' claim that the Act preempts State laws or regulations that impose additional unbundling requirements should be rejected.

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[157] *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540 (1977) ("Since it would be possible to comply with the state law without triggering federal enforcement action we conclude that the state requirement is not inconsistent with federal law").

[158] *See* GTE at 29.

[159] *See Northwest Cent. Pipeline* v. *Kansas Corp. Comm.*, 489 U.S. 493, 515 (1989).

IV. THE COMMENTS RESOUNDINGLY CONFIRM THAT THE COMMISSION SHOULD REQUIRE INCUMBENT LECS TO CONTINUE UNBUNDLING THE SEVEN NETWORK ELEMENTS IT IDENTIFIED IN THE FIRST REPORT AND ORDER.

The comments overwhelming confirm that the Commission should continue requiring incumbent LECs to unbundle the original seven network elements it designated in the *First Report and Order*. As shown below, the record evidence demonstrates that incumbent LEC failure to unbundle any of those elements would impair CLECs' ability to offer services.[160]

A. Local Loops

Virtually all commenters agree that incumbent LECs should be required to unbundle loops. Indeed, the record is replete with evidence demonstrating that the local loop is the quintessential bottleneck element, with numerous commenters illustrating the enormous cost and delay that would arise if CLECs had to broadly duplicate incumbent LEC loop facilities.[161] The

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[160] The Commission also should clarify in this proceeding that incumbent LECs may not place any restrictions on the use of network elements, including limitations on the ability of CLECs to migrate access lines to unbundled network elements. As the Commission previously held, the plain language of Section 251(c)(3) confirms that a requesting carrier may use network elements to provide any telecommunications service and does not restrict the use of unbundled elements in any fashion. *See, e.g.*, Order on Reconsideration, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 13042 (1996). Permitting carriers to use network elements to provide exchange access services, without regard to whether that carrier also provides local services to a given customer, is consistent with the Commission's prior holdings and will further the pro-competitive purposes of the Act, as well as the Commission's plan to achieve market-based access reform through the availability of network element-based competition. *See* "AT&T Corp. Comment on Further Notice of Proposed Rulemaking Released August 18, 1997," Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 97-295 (filed Oct. 2, 1997).

[161] *See, e.g.*, GSA at 5-6; Net2000 at 11-12; McLeodUSA at 6-7; Focal at 2,9; Allegiance at 14-17; California and California PUC at 4; ITIC at 3-5; Columbia Telecommunications at 9-13; Kentucky PSC at 2; TRA at 41; NorthPoint at 13-14; e.spire at 22-23; C&W at 34-35; RCN at (continued . . .)

commenters also discuss the recurring delay that would arise if a CLEC had to build out loop plant each time it won a new customer or augmented service to an existing customer.[162] Because incumbent LECs rarely experience this kind of delay, CLECs' attempts to compete broadly with incumbent LECs would be tremendously – usually fatally – disadvantaged if they were denied access to unbundled loops.

Nevertheless, the incumbent LECs attempt to carve out a significant exception to what should be a blanket loop unbundling requirement. Specifically, they insist that they should not be required to unbundle loops between "dense" wire centers and high volume customers.[163] Incumbent LECs offer two reasons why their refusal to offer these loops as unbundled elements

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(. . . continued)
14-16; OpTel at 4-6; Prism at 20-21; CoreComm at 25-26; Texas PUC at 14-16; MGC at 9-20; Rhythms at 12-18; KMC at 13-14, 19-21; Ad Hoc at 11; ChoiceOne at 15-16, 21-22, 25-26; Network Access Solution at 13-15; CPI at 13-17; CompTel at 31-35; Sprint at 28-29; Qwest at 59-66; ALTS at 35-46; Covad at 33-43; MCI WorldCom at 43-51; AT&T at 59-85; Illinois Commerce Commission at 11; Level 3 at 15.

[162] *See, e.g.*, AT&T at 62-63; ALTS at 38-39; *accord* CoreComm at 26; MGC at 12; Sprint at 29.

[163] On this point, the incumbent LECs offer a variety of approaches. For example, SBC (at 23) states that loops between large business customers with 20 lines or more served by wire centers with 40,000 or more access lines should not be unbundled. U S WEST (at 39) argues that DS-1 or higher capacity loops should not be unbundled. And GTE just states (at 63-70) that loops to all multiple dwelling units ("MDUs") and business customers with 20 or more access lines should not be subject to unbundling requirements. These unbundling exceptions could produce an administrative nightmare. For example, a typical large business customer currently may be served by a mix of loop types – DS0 analog loops and DS1 loops – at a single location. The incumbent LECs' proposed loop rules presumably would require the incumbent LEC to unbundle some of those loops, but not others, making the CLEC's task of initiating service to that customer highly complicated, and potentially jeopardizing the CLEC's customer relationship by introducing delay and requiring the customer to change its customer premises equipment or the mix of services to which it subscribes if it wishes to use the CLEC. All of these factors would place the CLEC at a substantial competitive disadvantage relative to the incumbent LEC, who could continue offering the same services the customer wants, without inconvenience or delay.

would not impair CLECs' ability to offer services. First, they claim that there are likely to be CLEC fiber strands already at dense wire centers. Second, they assert that the fact that CLECs have built out some loops to some high volume customers in the past demonstrates that CLECs can justify the cost and delay of doing so for all such customers in the future. Of course, if these assertions were true, it would not warrant excluding loops from the list of unbundled elements that must be made available, because CLECs will always prefer to own their own facilities, given a genuine choice. The record evidence, however, clearly demonstrates that the incumbents' arguments are baseless.

The CLEC comments show that the difficulties associated with self-provision of local loops, particularly the difficulty of obtaining access to individual building premises when sought by a party other than the incumbent, make access to unbundled loops a critical transitional measure, even for those CLECs that actively seek to deploy their own loop facilities to business customers and MDUs. Without access to unbundled loops today, these CLECs' ability to compete is significantly impaired because of the delays and additional costs they must incur to serve many higher volume customers. [164]

[164] In their comments and in the *Huber Submission*, the incumbent LECs also engage in substantial arm-waving about potential loop alternatives from emerging technologies such as mobility wireless, fixed wireless, and cable telephony. These technologies may someday provide a suitable alternative to incumbent LEC loops, at least under certain market conditions. But as AT&T demonstrates in its comments (at 67-72), and indeed as the incumbent LECs acknowledge in their comments, the key fact for this proceeding is that they do not do so today. *See also* Laurence Swasey, "Waiting for the Wireless Local Loop," *Telecommunications* at 44 (Jan. 1999) (Wireless local loop "technology has yet to be deployed on a large scale. This will eventually change, but it will be the next century that defines [this technology], not this one"); *id.* at 45 (Wireless local loop costs will not fall below the critical threshold in the United States of $500 per line until after 2002).

1. CLECs Cannot Compete Broadly, Even For High Volume Business Customers, Without Access To Unbundled Loops.

The incumbent LECs' proposals to limit the availability of loops are based almost entirely on the fact that a few CLECs are providing local service to some large business customers in a limited number of buildings.[165] From these "facts," the incumbent LECs leap to the conclusion that denying CLECs access to loops in a broad array of circumstances would not impair their ability to provide service to at least some subset of customers. This conclusion is unsupported and demonstrably false.[166]

a. Contrary To The Incumbents' Assertions, The Presence Of One CLEC's Loops In A Building Does Not Establish That Other CLECs Would Not Be Impaired If They Were Denied Access To Unbundled Loops.

Preliminarily, adoption of the incumbent LECs' claims would violate Section 251(d)(2) and defeat the objectives of the Act even if restrictions on the availability of loops were limited to large customers located in the individually identified commercial buildings currently served by a CLEC as well as by the incumbent LEC. The reality is that the presence of one CLEC in a

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[165] The *Huber Submission*'s estimate that CLECs serve 15 percent of large buildings is grossly overstated. *See Huber Submission*, III-3 & n.11. First, the *Huber Submission* compares 1998 office buildings served by CLECs to the total number of commercial buildings in 1995, which is a temporal mismatch, since the number of commercial buildings likely increased between 1995 and 1998. Second, and more importantly, it appears that the *Huber Submission* arrived at its figure of 705,000 total buildings by including only "office" buildings instead of all "commercial" buildings. The total number of commercial buildings, according to the cited report, is 4,579,000. Using that number, the more accurate CLEC penetration is 2 percent. *See* U.S. Dept. of Commerce, *Statistical Abstract of the United States 1998*, p. 734 (Table 1229).

[166] GTE has also argued that the Commission should limit the availability of unbundled loops to service "multiple dwelling units," or MDUs. GTE at 68-71. The arguments in this section apply equally to high volume business customers and MDUs.

commercial building necessarily establishes only that one or more of that building's tenants have a choice of two carriers.[167] But the Supreme Court has recognized that the object of the Act is to create "competition among multiple providers of local service," not to transform monopolies into duopolies.[168] Further, a second or third CLEC who wants to provide service in such a building surely will be impaired if it cannot obtain network elements from the incumbent LEC, for the CLEC with facilities has no duty (and may often have no ability without renegotiating terms with the landlord) to provide unbundled loops to other CLECs. Those CLECs will almost certainly need access to incumbent LEC unbundled loops if they are to provide service to the building in the near term, and there is a strong likelihood that they will not be able to justify establishing a third or fourth set of wires into a building unless and until they have established a customer base there.

b. The Incumbents' Proposed Restrictions On Loop Availability Are Not Supported By The Supreme Court's Analysis Or The Real-World Impact On CLECs.

More fundamentally, incumbent LECs' proposed denial of access to unbundled loops is not limited to buildings already served by other carriers. Rather, they claim that *all* large business customers in commercial buildings comprise a single "product" market, and that because some CLECs may have extended fiber to serve some customers in some buildings, all CLECs can do

[167] In some buildings where AT&T provides service using its own loops, it is only able to serve specific customers, not all building tenants. Lynch Aff. ¶ 10.

[168] *See AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S. Ct. 721, 726 (1999).

the same to serve all customers in all other such buildings that may be, for example, served by a wire center with more than 40,000 lines. These contentions are wrong.

The Supreme Court's decision and the Act patently do not permit, much less require, the Commission to make these determinations on a market-by-market basis. The question under § 251(d)(2) is whether a requesting carrier will be impaired without access to a LEC element, irrespective of whether that CLEC would be offering service in a market where other CLECs actually have their own facilities, much less in locations where there is no evidence that a CLEC is or could serve customers through self-deployment of loops.[169]

Moreover, the incumbent LECs are simply wrong in their bald assertions that all of the commercial buildings (or their tenants) that are served today only by incumbent LEC facilities are within the same product and geographic market as the buildings (and tenants) that also are now reached by CLEC fiber facilities. It is elementary economics that two buildings are not in the same market unless tenants in each building can obtain reasonable substitutes for the services that they now use from similar sets of alternate suppliers who can and do charge similar prices to tenants in both buildings. That condition simply does not exist.

As explained here by AT&T and others,[170] there exist right of way problems (both public and private), physical limitations, and other impediments to service that did not apply (or have been overcome) to the small portion of commercial buildings that CLECs now reach, but that do

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[169] *See First Report and Order* ¶ 12 (the Act contemplates multiple avenues of entry into the local market).

[170] AT&T at 63-66; accord Allegiance at 16.

apply, to varying degrees, to the buildings that CLECs do not now serve with their own facilities. The remaining buildings are those that CLECs cannot, due to one or more of these concerns, serve through their own facilities. It will take substantial time for CLECs to overcome these problems and extend alternative facilities to these additional buildings, which represent the vast majority of properties in the country. Thus, CLECs' ability to provide service in these buildings will be currently "impaired" if they are denied access to incumbent LEC loops. Moreover, CLECs who build facilities to serve these other buildings in the future may incur significantly greater costs than the incumbent, and because of the higher cost structure, there will be far less potent constraints on the incumbent LECs' prices.

Indeed, self-provision of loops involves even more cost and delay than self-provision of dedicated transport.[171] To self-deploy loops, CLECs must go through all of the same costly, time-consuming steps involved with dedicated transport, including negotiation of right-of-way agreements, obtaining capacity, collocation in LEC central offices, and purchase and deployment of equipment (followed by testing and activation). While each of these steps for loops is equivalent in terms of cost and complexity compared to dedicated transport, CLECs generally cannot spread those loop costs over a number of customers, as it can with dedicated transport. Thus, requiring self-provision of loops would impair CLECs' ability to serve customers even more than with dedicated transport.

[171] *See infra* Part. IV.E.

Moreover, as Professors Hubbard, Lehr, Ordover, and Willig explain (Aff. ¶¶ 35-38), the Commission should not infer that CLECs could deploy self-provisioned loops more broadly from the mere existence of today's limited entry. In most cases, CLECs can justify serving high volume customers using their own loops because the incumbent LEC currently charges their retail customers supracompetitive rates, which creates a pricing umbrella. Although CLECs have vigorously sought to enter these markets, they recognize that incumbent LECs could drop their retail prices at any time, thereby making competition without unbundled network elements infeasible.[172] In those relatively few cases where problems with self-provisioning are at a minimum and the potential revenue from a particular serving area is especially high, aggressive CLECs may find it acceptable to run the risk of self-deploying loops even though the incumbent LECs could collapse the pricing umbrella at any time. In most cases, however, the difficulties, delay, and costs associated with self-provisioning loops would preclude a rational CLEC from assuming the risk of entry unless unbundled loops were available at cost-based rates.

c. Building Access Limitations Create Even Greater Barriers For CLECs.

The incumbent LECs also ignore the problems that CLECs face in attempting to obtain access to space in buildings they want to serve. As shown in the affidavit of Kevin Lynch and

[172] *See* Hubbard/Lehr/Willig Affidavit, AT&T Ex.-C ¶ 18 ("If a firm has higher costs than its rivals, the natural competitive process inevitably will propel prices below the costs of the high-cost firm, forcing it to exit the market. Moreover, a rational CLEC will anticipate this outcome of the competitive process and, if it knows it would have higher costs than the incumbent LEC in a particular market, it simply will choose not to commit its liquid capital to enter that market in the first place.").

described below, these practical difficulties alone would justify a requirement that CLECs be provided access to unbundled loops at the DS1 level and above.

The CLECs' principal problems in this regard stem from the fact that the Act does not grant them the right to obtain leased space within buildings for the deployment of loop facilities. Moreover, in virtually every jurisdiction in the country, incumbent LECs have a legal right to enter a building to provide telephone service to its occupants, while CLECs have no such right at all. As a result, even if a CLEC has a fiber facility that passes a particular building, it is often very difficult for that CLEC to obtain the access it needs to install its own loop facilities in that building.[173] Because of this fundamental competitive asymmetry, CLECs need unbundled loops to serve customers – at least during a substantial transition period – until it can secure the necessary access and install its own facilities at costs that will permit them to compete against the incumbent.

CLECs' building access problems take two forms. First, in some instances, landlords simply refuse to permit CLECs to enter the building at all. Indeed, even in the few locations where state laws or regulations grant CLECs a legal right of entry,[174] AT&T's experience is that

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[173] Thus, for all these reasons, GTE's claims that CLECs have deployed fiber strands within 1000 feet of 97% of business customers in Dallas/Fort Worth, 27% in Tampa, and 25% in Los Angeles (*see* GTE at 65) prove nothing. Because of the obstacles to deploying its own loops, even though AT&T has fiber routes in those cities, it has deployed its own loop facilities in only 170 buildings in Dallas, 123 buildings in Los Angeles, and no buildings in Tampa. Lynch Aff. ¶ 10. And in most the buildings where it provides loops, AT&T has only "fiber to the floor," *i.e.*, it can serve only the customers on certain floors, not the whole building. *Id.*

[174] *See, e.g.*, Tex. Util. Code, §§ 54.259-54.261 ("if a telecommunications utility holds a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and holds a certificate if required by this title, a public or private property owner may not (1) (continued . . .)

some landlords still assert a right to refuse entry.[175] In such circumstances, CLECs simply have no choice but to rely on the incumbent LECs' loop facilities.

Second, even where a landlord allows a CLEC to place facilities in its building, CLECs must routinely engage in arduous negotiations to obtain the necessary right of entry and to lease the necessary space. Because CLECs have no legal right of entry, landlords hold enormous leverage over CLECs, and they use that leverage to impose burdensome restrictions and substantial fees on a CLEC's use of its space.[176] Even in the best of circumstances, CLEC negotiations with landlords take at least two months; four to six months is far more common.[177] And in all cases, such negotiations and payments place CLECs at a competitive disadvantage to the incumbent LEC.

The length of time required for these negotiations means that CLECs typically cannot serve a building's tenants without the ability to obtain unbundled loops at the DS1 level and above. Indeed, while the CLEC is still negotiating the terms on which it can enter a building, incumbent LECs routinely offer the customer their own upgraded, competing service to the building's occupants. Critically – and, unlike the CLEC – the incumbents can implement such

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(. . . continued)
prevent the utility from installing on the owner's property a telecommunications service facility a tenant requests . . . ").

[175] *See* Lynch Aff. ¶ 5.

[176] In contrast, even apart from their legal right of entry, when incumbent LECs first sought building access, they had considerably more economic leverage than do CLECs today, because the incumbents were the only source of telephone service for the building's tenants.

[177] Lynch Aff. ¶ 7.

offers immediately. Unless the CLEC can match that offer by providing service via the incumbent LEC's loop facilities in the interim, the incumbent LEC often wins that business.[178]

In sum, unless the CLEC already has its facilities in the building, it almost always has to provide service initially using the incumbent LEC's facilities. Indeed, in AT&T's experience, it has served roughly 80 percent of its high-volume customers initially through incumbent LEC access channel terminations. AT&T then transfers those customers to AT&T loops at a later date when (and if) it has obtained the necessary building access and won enough business in the building to justify a full build-out. Without the ability to serve those customers at least initially using incumbent LEC facilities, AT&T would have lost a substantial percentage of the customers it currently has.[179]

In the end, these obstacles to competing for high volume customers threaten not only competition for those customers but for *all* customers. As is generally acknowledged, the most natural local entry strategy for most CLECs is to target higher volume customers first, and then, as it builds facilities and wins a customer base, to expand and compete for smaller businesses and residential customers.[180] Without a rule that guarantees access to unbundled loops at the DS1

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[178] *Id.* ¶ 8.

[179] *See* Lynch Aff. ¶¶ 8-9. As Mr. Lynch also explains in his affidavit (¶¶ 6-7), landlords frequently impose substantial recurring charges for rights of entry and sometimes also the use of riser space – charges incumbent LECs do not have to pay. At the margin, these fees force CLECs to forego facilities-based entry into some buildings.

[180] *See, e.g.*, Description of the Transaction, Public Interest Showing and Related Demonstrations, *In re Application of Ameritech Corp. and SBC Communications Inc. for Authority to Transfer Control of Licenses Controlled by Ameritech Corp.*, CC Docket No. 98-141 (filed July 24, 1998); Affidavit of James S. Kahan, *In re Application of Ameritech Corp. and SBC Communications Inc. for Authority to Transfer Control of Licenses Controlled by Ameritech Corp.*, CC Docket
(continued . . .)

level and above, the Commission would be eliminating the most natural entry point into the local market for most CLECs and creating a substantial disincentive for investment by CLECs.

2. The Comments Clearly Demonstrate The Need For The Commission To Clarify Its Loop Unbundling Requirements.

The record also demonstrates that, in order to support the development of local competition, the Commission should do more than simply reaffirm that incumbents must provide unbundled loops in accordance with Section 251(c)(3). Three years of experience with incumbents' efforts to limit CLECs' access to their unbundled network elements have highlighted the need to issue clear rules to ensure that CLECs using unbundled loops can compete effectively. For example, several commenters propose modifying the termination point of the loop at the customer premise to include inside wiring, riser cable, and other equipment as well as access space.[181] Other commenters propose modifying the loop termination point on the incumbent LEC

(. . . continued)
No. 98-141 (filed July 24, 1998) (SBC and Ameritech describe their "National-Local Strategy" as deploying facilities to serve large and mid-size businesses "initially," which will form the "foundation on which the new SBC will launch the second component" of the strategy, "to provide service to small business and residential customers").

[181] *See, e.g.*, MediaOne at 16-19 (network terminating wire in MDUs); Qwest at 62 (the CLEC should chose the beginning and ending termination points of the loop); CompTel at 32; *id.* ("loop includes all necessary electronics attached to it"); *id.* at 35 (CLECs must have unbundled access to inside wire); MGC at 9; *id.* at 18-19 (loop should include cross-connects); KMC at 22 ("The Commission should designate premises and building entrance facilities such as junction and utility boxes, house and riser cable, and horizontal distribution plant as UNEs"); Choice One at 23-25 (same); Level 3 at 21 (same); KMC at 23 ("all wiring owned by the ILEC will be a UNE even if it is on the customer side of the demarcation point); Choice One at 23-25 (same); Level 3 at 21 (same); CPI at 17 (loop should "include all its potential functionality, including multiplexing, coding, modulation, and loss and gain insertion"); *id.* at 17 ("in certain situations, such as in many multi-tenant buildings, the ILEC itself may own the premise wiring between the NID and subscriber premises equipment"); CoreComm at 35-36 (inside wiring, junction and utility boxes, house and riser cable, and horizontal distribution plant should be UNEs); Teligent at 2 ("The (continued . . .)